United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2293
74-2524

To be argued by
GEORGE E. WILSON

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket Nos. 74-2293, 74-2524

UNITED STATES OF AMERICA,
Appellee,

—v.—

JAMES G. MARTIN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

James G. Martin appeals from a judgment of conviction entered November 15, 1974, in the United States District Court for the Southern District of New York, after a six-day jury trial before the Honorable Richard Owen, United States District Judge (Dkt. No. 74-2524).

Martin also appeals from a judgment of criminal contempt entered September 30, 1974 by Judge Owen during trial (Dkt. No. 74-2293).

By order of this court dated December 6, 1974, the appeals were consolidated.

Indictment 74 Cr. 197, filed February 25, 1974 charged Martin in two counts with income tax evasion, Title 26, United States Code, Section 7201.

Trial began on September 23, 1974, and Martin was found guilty as charged on October 1, 1974.

On September 30, 1974 Judge Owen held Martin in criminal contempt in violation of Title 18, United States Code, Section 401(3) and sentenced him to 6 months imprisonment, to begin upon the conclusion of his trial. He was later ordered to surrender on October 4, 1974. On October 3, 1974 this Court continued Martin in his present bail pending appeal of the order of contempt.

On November 15, 1974 Judge Owen sentenced Martin to imprisonment for 1 year and 1 day on each of the counts, to run concurrently with each other, both to run consecutively with the contempt sentence. Martin remains free on a $5,000 personal recognizance bond pending appeal.

Statement of Facts

A. The Government's Case

Using a specific items theory, the Government proved that Martin evaded taxes on a large portion of his income for the years 1967 and 1968. In order to establish the existence of these specific items of omitted income ($14,603.59 for taxable year 1967 and $9,064.28 for taxable year 1968), the Government proved that Martin had embezzled these amounts while Director of Finance at the St. Agatha Home for Children in Nanuet, New York, a non-profit child care agency run by the Roman Catholic Sisters of Charity.

Sister Mary Joanne Ward was assigned to St. Agatha's from 1953 to 1968, and from 1964 to 1968 was the Administrator of the Home. Martin had worked in the accounting office since 1953 (Tr. 30) * and served as Director of Finance from 1964 to 1968. He was in charge of all finan-

* References to "T." are to the transcript. "GX" denotes government exhibits; and "App. Brief" denotes the appellant's brief.

cial reports, money coming in and going out, including the payroll (Tr. 28, 37-39). The budget during this period was between 2 and 3 million dollars (Tr. 33). Martin never complained to Sister Joanne during her tenure as Administrator about any irregularities in the accounting Department (Tr. 45).*

Sister Helen Murphy of the Sisters of Charity became administrator of the home in 1968. She testified that the majority of funds needed to run the Home are received from the New York City Welfare district, which sends dependent and neglected children to the home. These funds are supplemented by private donations (Tr. 46-47).

In September, 1968, when she became Administrator, Sister Helen was advised by the auditors, who had begun an audit, that the books of the Home were not up to date (Tr. 60). She warned Martin to improve his record keeping, which was then in such a state as to make an audit impossible to complete (Tr. 51-53). In January, 1969, the auditors advised Sister Helen that they could not certify their work because payroll checks and bank statements were missing (Tr. 53). In February, 1969, Sister Helen again spoke to Martin about the missing records and placed him on leave until the matter could be resolved (Tr. 64). In March or April he was terminated. In June, 1969, Sister Helen and Paul McDonald, the Home's financial advisor, visited Martin at his home and questioned him about the missing records. Martin denied any wrongdoing, claiming that the records may have been stolen and accused McDonald of taking the money (Tr. 59).

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* Presumably Martin was qualified for his job. Martin's employment record (GX 5) revealed that he had studied accounting for 3 years at Fordham and New York Universities (Tr. 49).

Robert P. Cardany, Jr. the present Director of Finance assumed his duties in June, 1969 (Tr. 67). Cardany, an accountant, had previously been employed by the Home's accounting firm and was involved in the unsuccessful 1968 audit attempt. He was unable to complete the audit because of his inability to accomplish a bank reconciliation due to the absence of most of the payroll bank statements, all of the cancelled payroll checks and about half of the expense account checks and statements. (Tr. 71-72). Cardany was assisted by Stephen K. Novak, a certified public accountant, who obtained photostats of the missing checks and statements from the bank (Tr. 126). Novak discovered checks which were not on the books (Tr. 129).* At that point an inventory was made of all the records which could be located (GX 10) (Tr. 131). The original payroll checks and bank statements for all of 1967 and from January through September of 1968, were missing.

Ethel Weiss, who had been employed in the finance department of St. Agatha's since 1960 and was Martin's assistant, testified that the books for the home including its bank statements and cancelled checks were kept in Martin's office in a safe and a steel cabinet (Tr. 188-189). Occasionally Martin would discuss betting on horses with Mrs. Weiss, but she could not recall the frequency or amount of bets (Tr. 206).

John Murphy, an IRS special agent, was assigned to investigate Martin (Tr. 140). By examination of the payroll register for 1967 and 1968 he made a list of all unrecorded check numbers (GX 11, 12). He then searched the bank's microfilm records and made copies of every unrecorded check and of any check whether recorded or not which bore Martin's name as payee or indorser

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* Cardany had explained the process used to issue payroll checks and how unrecorded checks could be made (Tr. 78-118; GX 8, 9, 26, 26A).

for 1967 and 1968 (Tr. 146). Murphy identified all of Martin's recorded payroll checks, which accounted for the gross income reported on his tax returns for 1967 (GX 1, 8, 13, 18A), and 1968 (GX 2, 9, 14, 18B) (Tr. 147-149, 158-160). He then listed the additional unrecorded payroll checks issued to Martin during 1967 and 1968, which totaled $3,497.04 for 1967 and $5,150.36 for 1968 (Tr. 150-151, 158-161; GX 15, 16, 18A, 18B). The unrecorded payroll checks payable to other employees,* none of which was part of the regular payroll (Tr. 153, 161; GX 17-3-17-56, 18C), purported to bear the employee's signature as a first endorsement and most bore Martin's name as a second endorser. Checks on which Martin's name did not appear as second endorser bore instead the second endorsement of stores in Martin's neighborhood (Tr. 161, 167).

On March 10, 1971 Martin told Milton Seloman, an IRS Special Agent, that he had been a bookkeeper at the home for 17 years but denied having any authority to draw checks on St. Agatha's ** or having embezzled any money from St. Agatha's. He stated that he had prepared his own returns without any assistance (Tr. 172), and that his entire income was set forth on his forms W-2 issued by the home. He admitted however, that money he had borrowed from finance companies, a bank, and unidentified loan sharks, was used for gambling at the race tracks (Tr. 174).***

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* 5 employees were fictitious (Tr. 49-50).

** This was proven false by both Mrs. Weiss and Kathleen Sheridan, the administrator's secretary (who had custody of the signature stamp). Each testified that Martin had authority and that he did sign checks (Tr. 191, 212).

*** On his 1965 return he reported both gambling winnings and losses (GX 28; Tr. 187).

On October 6, 1972 and again on January 29, 1974, Murphy interviewed Martin about the embezzlement at St. Agatha's. Each time Martin denied having benefited from any embezzlement scheme. He did claim that he had cashed checks for 40 or 50 employees * including some at stores in his neighborhood (Tr. 166) but always turned the funds over to the employees and did not keep any for his own use (Tr. 347). He further stated that any shortages was due to "the way the place was run" but would not identify anyone responsible for the shortages (Tr. 166). Martin admitted signing his endorsements on both his recorded (GX 13 and 14) and unrecorded (GX 15 and 16) payroll checks for the years 1967 and 1968 (Tr. 312) and acknowledged that he signed his signature as endorser on each of the checks drawn to other employees (GX 17-3 through 17-56) (Tr. 313), including 2 checks drawn to nonexistent employees John Reilly (GX 17-49) and John Rodgers (GX 17-50) (Tr. 315-316). The total of the unrecorded checks (GX 18A-C) payable to Martin and others was $14,603.59 for 1967 and $9,064.28 for 1968 (Tr. 319).**

Each of the non-fictitious employees shown on the unrecorded payroll checks (GX 18C) testified substantially that the first endorsement on the back of what purported to be his or her check was not authentic, that he or she

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*Murphy would later learn that that figure was actually only 4 or 5. The employees worked in the typing pool in the accounting office (Tr. 353).

** Murphy also discovered approximately $46,000 in unrecorded expense account checks for the years 1967 and 1968 (Tr. 345) and numerous "rollover" loans from the Nanuet Bank in the amount of approximately $50,000 that were not carried on the books of the home (Tr. 330, 352) the proceeds of which were used to repay prior loans (Tr. 346). Murphy found other unrecorded payroll checks (Tr. 348), ($4,581.97 for 1967 and $3,688.06 for 1968) with endorsements similar to GX 17 which he did not include in his investigation because he either could not locate the employees or they were deceased (Tr. 351). None of this was included in the tax evasion prosecution.

did not ever authorize Martin to sign or cash any checks, and that he or she never received the proceeds of that particular check (Tr. 210-309, 358-360).

Sidney Goldblatt, an examiner of questioned documents,* examined Martin's recorded paychecks for 1967 and 1968 (GX 13, 14); Martin's unrecorded paychecks for 1967 and 1968 (GX 15, 16); the unrecorded paychecks to other employees for 1967 and 1968 (GX 17-3 through 17-56); Martin's handwriting exemplars (GX 22, 22A through 22-D);** and the signatures of 28 employees (GX 23-A through 23-BB). He compared the genuine employee signatures in GX 23 with those purporting to be employees' signatures on the first endorsements in GX 17 and concluded that the employee endorsements were forged (Tr. 370). He further concluded that it was "very likely" *** that Martin did the forgery (Tr. 374).

Sidney Buchbinder, an IRS technical advisor qualified an expert in computing income tax, examined the computations found in Murphy's summary (GX 18-D) and assuming such income was changeable to Martin computed an additional taxable income of $14,479.83 was an additional tax due of $3,360.11 for 1967 and an additional taxable income of $9,064.28 with an additional tax of $2,255.85 for 1968 (GX 25; Tr. 401-404).

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* 33 years with the U.S. Department of Treasury as Inspector, Special Investigator and for the past 21 years prior to retirement, as a Senior Document Analyst in charge of the North Atlantic Region (Tr. 360-363).

** Obtained on January 29, 1974 by Murphy (Tr. 310).

*** Goldblatt explained his findings in detail (GX 30; Tr. 379-397). As is standard practice in the field. Goldblatt could not reach a "positive" conclusion in the absence of original questioned documents (Tr. 378), GX 17 consisting entirely of photostats obtained from the bank.

B. The Defense Case

Muriel Martin, the defendant's wife, testified that she had 3 children (2 boys and a girl). She testified about the modest circumstances of their home and standard of living (Tr. 407-414). She admitted that Martin would go to the race track twice or three times a week but was unable to recall when he began gambling and was unaware that he had borrowed from loan sharks to finance his gambling (Tr. 416).

The defendant also took the stand. His testimony began with a flat denial that he ever "took one penny from St. Agatha's Home for (his) personal use at any time" (Tr. 431, 432). He insisted that the income shown on his 1967 and 1968 return was his sole income (Tr. 439) and he prepared his own returns without any help (Tr. 477).

Martin admitted that during 1967 and 1968 he was in charge of the finance office (Tr. 423) and that he made the checks (Tr. 451) and forged the endorsements on the employees unrecorded checks (Tr. 422, 430, 433, 446, 452). He claimed, however, that due to "irregularities" he had helped to perpetrate a "cover-up" which he first became aware of in 1950 (Tr. 436). This cover-up involved a continuing $50,000 bank loan which was required periodically to replenish the cash account (Tr. 428) and the making of entries in the accounts payable ledger to falsely show that bills were paid. He submitted false reconciliations to the accounting firm (Tr. 430) and prepared false payroll and expense checks (Tr. 432), claiming that it was necessary to issue and cash bogus checks during 1967 and 1968 (and prior years) in order to pay the government for delinquent withholding taxes (Tr. 437), the state, and other vendors. He also claimed that some of the money got back into St. Agatha's accounts, principally the savings account (Tr. 432, 437). He claimed responsibility for concealing a $200,000 shortage "year in and year out" by coming up with a trial balance on the books that did not reflect any shortage (Tr. 454). However, subsequently he

denied preparing a false trial balance and was unable to explain what he did to effectuate the coverup or why one was necessary or who caused the shortages (Tr. 455-456).

He did not bring the shortage to the attention of Sister Helen, Sister Joanne * or the auditors (Tr. 457). Moreover, he did not bring it to the attention of two other nuns, Sisters Anita and Theresa, under whose supervision he worked in the 1960s (Tr. 512). He claimed that he could not recall whom he worked for prior to that time (Tr. 512), but admitted lying about that thereafter, (Tr. 514), intimating that perhaps that person was the real villain. Martin denied any responsibility for initiating the coverup and made no effort to clear the matters up during the entire time he was employed at the home (Tr. 462, 509). At first he insisted that he only did it to protect someone whom he continually refused to name ** even though he had threatened to do so in June, 1969, at his meeting with Sister Helen and Mr. McDonald *** (Tr. 484). Later on, however, he contended he did not report the shortages because he would have been blamed for it (Tr. 510).

After being directed by the Court to do so Martin persisted in his refusal to name the person or persons responsible for the coverup or the person to whom he had

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* Who had been at the home since 1953 (Tr. 30).

** ". . . and if it calls to bringing up names, Mr. Greenburg, I am not going to do that . .." (Tr. 432); "I am not going to use any names in this defense at all" (Tr. 436); Q. "Were you protecting someone?" A. "Probably." Q. "Who were you protecting?" A. "I don't know" (Tr. 459); "And I don't intend to mention any names * * *" (Tr. 485); Q. "Did you bring it to anyone's attention?" A. "If I say yes it seems to be a federal case. I said it last week, and you know . . . I'm not going to name any names in this case" (Tr. 490); A. " * * * I brought this to somebody's attention at the home, absolutely" (Tr. 491).

*** Whom he had one time accused of taking the money (Tr. 59).

reported it.* After being afforded an opportunity to reconsider, Martin persisted in his refusal, claiming through counsel that he was protecting a nun (Tr. 501). Martin was held to be in disobedience to a lawful order of the Court and therefore in contempt of Court. He was sentenced to 6 months imprisonment to being at the conclusion of trial (Tr. 503).**

Martin admitted going to the Yonkers or Roosevelt Raceway twice or three times a week, betting up to $100. (Tr. 434) He had no idea how much he spent a week at the races (Tr. 455). Although he won 2 or 3 twin-doubles, he only reported his winnings on his 1965 income tax return.

Martin falsely testified that he had 4 dependent children in 1967 and 1968 (Tr. 476). Each of his tax returns for 1967 and 1968 listed "Kevin M" as a dependent child (Item 3 of GX 1 and 2). When questioned about Kevin, Martin said that Kevin Michael had died in 1967 or 1968.

C. The Government's Rebuttal

A certified copy of a death certificate for Kevin Michael Martin (GX 31) revealed that he had died in infancy on October 27, 1959 (Tr. 521).

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* Mr. Wilson: "Your Honor I ask the court to direct the witness (to) answer the question.

The Court: "Yes, Mr. Martin, you are directed to answer that question".

The Witness: "The answer is that I did bring it to somebody's attention, Your Honor, and as far as naming names at this stage of the game if we stay here 'till doomsday I wouldn't name anybody." (Tr. 491)

** He was later successful in his application to this Court for continuance on bail pending appeal.

ARGUMENT

POINT I

The Contempt Order and Sentence Were Entirely Proper.

Martin claims that in "substance, and by his own design" he complied with the Court's direction to reveal the identity of the person to whom he allegedly reported the financial irregularities of the Home, and now contends that he purged himself and should not be held in contempt. Even if this were true he is not entitled to any relief.

Martin's defense was beguiling. He simply admitted his embezzlement and attempted to explain it by way of a dark conspiracy of nearly 20 years duration. His explanation of the "conspiracy" was vague, contradictory and illusive, as was his explanation for the specific uses of the funds he embezzled. He consistently refused to identify any of the "conspirators" (Tr. 432, 436, 459, 485, 490, and 491) and could not explain why such a state of affairs was allowed by him and others to proceed unabated for nearly 20 years through several changes of administration.

Judge Owen emphasized the obstructive effect Martin's refusal had on the case:

> "* * * I would be deeply distressed at the thought of a rule of law that would permit a defendant to come in, give a defense and then block the checking of that defense by saying, 'I am not going to give you any names.'
>
> I would think that if the law were on the books that a defendant could defend in a criminal case by saying, 'This is my story but you may not check on it because I will give you no names.' I think that would be a dreadful situation because it gives a de-

fendant the option of coming in, giving a story that he may think is plausible or he may not, but he gives his story and then he says, 'That's it, jury you may not like it if I don't answer'—in this case, 'I am not answering on the religious grounds,' is the way he put it, and I don't remember if that was to the jury or me, but he said, 'That's the end of it, that's my story, and I will not suffer questioning on it because I won't let you open the door to examine its cracks and its rough spots.'

Now, I think that would be a terrible situation, if we did it, if the prosecutor's office were faced with a rule of law that permitted a defendant that option in any case. I think it is dreadful, particularly in this case, where in my judgment Mr. Martin, who the jury found, and I completely credit the jury, found that he was involved in an embezzling scheme from which he personally profited and said that he had been carrying on this scheme as part of a cover-up of a prior embezzling scheme at St. Agatha's and he never could really tell us how the scheme worked or why it existed or what was done with the money and then said, 'That's my statement, ladies and gentlemen,' and, in two or three sentences, 'I covered up a prior embezzlement and that's it." (Tr. 634-636)*

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* In light of his previous testimony his refusal to answer may also be and was fairly characterized by Judge Owen as an obstruction of Justice (Tr. 625, 634-636) as well as a disobedience of a court order. *See Yates* v .*United States*, 355 U.S. 66 (1957) where a witness was held in criminal contempt for refusal to identify others as communists. The Supreme Court, in upholding the contempt conviction, stated: "A witness of course cannot pick and choose the questions to which an answer will be given. The management of the trial rests with the trial judge and no party can be permitted to usurp that function." *Id.* at 73.

Also it is clear that the fact that Martin had perjured himself had no bearing on Judge Owen's finding of contempt.

While conceding that he refused to answer the question: "Who at the Home was the person whose attention you brought it to?" (Tr. 490) Martin contends that he purged himself in substance by obliquely admitting that he knew who he worked for after previously denying that he did.* But the question which was the basis of the contempt concerned the *name* of the person Martin allegedly told whenever he learned of shortages in the books (Tr. 507), and the record in no way establishes the name of the person he worked for or whether that person and the person he told of the shortages were the same. Since the Government was foreclosed from going back into the basis of the contempt (*id.*) Martin was safe in his continued attempt in the presence of the jury to frustrate legitimate inquiry into the major area of his defense and to foreclose the Government to explore its truth or falsity (Tr. 499-500). His sole reason, advanced through counsel out of the presence of the jury, was that for religious reasons he could not implicate a nun. However, such a ground is no defense to a refusal to answer *Smilow* v. *United States*, 465 F.2d 802 (2d Cir.), *vacated on other grounds*, 409 U.S. 944 (1972).

Moreover, even assuming *arguendo* that Martin's subsequent conduct constituted compliance, unlike civil contempt under Title 28, United States Code, Section 1826 which is coercive, criminal contempt is punitive and cannot be absolved by subsequent compliance by the contemnor. *Yates* v. *United States, supra; See United States* v. *Greyhound Corp.*, 363 F. Supp. 525 (D.C. Ill, 1973), *supplemented* 370

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* A. "As far as I know I never told a lie until just then when I said I didn't know who I worked for."

Q. "Pardon me."

A. "Until I just said I don't remember the name of the person I worked for."

Q. "Was that a lie?"

A. "Well that was part of the conference we had inside." (Tr. 514)

F. Supp. 881 (1974); *United States* v. *Brewster*, 154 F. Supp. 126 (D.C. 1957), *rev'd on other grounds*, 255 F.2d 899 (D.C. Cir.), *cert. denied*, 358 U.S. 842 (1958). The punishment Martin received is entirely justified by the circumstances * and should not be disturbed in the absence of an abuse of discretion. *Frank* v. *United States*, 395 U.S. 147 (1969); *United States* v. *Seavers*, 472 F.2d 607 (6th Cir. 1973); *United States* v. *Galante*, 298 F.2d 72 (2d Cir. 1962); *Nilva* v. *United States*, 227 F.2d 74 (8th Cir. 1955), *rehearing denied*, 228 F.2d 134; *affirmed in part and sentence vacated on other grounds*, 352 U.S. 385 (1957);

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* Judge Owen set forth in detail the justification for his 6 month contempt sentence (Tr. 634-636) on November 15, 1974. In a supplemental memorandum filed on November 22, 1974 he further commented on the appropriateness of his sentence viewed in light of the pre-sentence investigation as had been previously requested by the defense:

> "I did study the pre-sentence report before denying the motion to vacate the contempt sentence. I wish to state that nothing contained in that report in any way made me believe that a six-month sentence for contempt of Court was unjustified. On the contrary, its contents supported my conviction that such sentence was appropriate. In particular, the report described Martin's involvement in a certain check-kiting scheme using his bank account which ultimately led to the guilty pleas of two individuals, William Elfers and William Bruederlain. Prosecution against Martin was declined since Martin was slated to give testimony had the case gone to trial. This history, of which I was previously unaware, makes it clear that Martin had a participant's familiarity with criminal law and criminal processes at the trial before me. Also, the report did not give any greater substance to the claimed "religious background" argument asserted at the time. Thus, it appears even more clearly now than it did on the trial on October 1, 1974, that Martin's conduct in raising an unusual defense and thereafter refusing to be cross-examined on matters relevant to that defense was a deliberate effort to block the prosecution against him, necessitating swift corrective action by this Court."

In re Sopol, 242 F. 487 (2d Cir. 1917). *See also, Gore* v. *United States*, 357 U.S. 386 (1958); *United States* v. *Malcolm*, 432 F.2d 809 (2d Cir. 1970); *United States* v. *Bernstein*, 417 F.2d 641 (2d Cir. 1969).

POINT II

There Was No Error In Judge Owen's Charge.

Martin seems to contend that the Court erred in instructing the jury in such a way so as to demolish his defense. The contention is insubstantial.

The attack on the credibility instruction is totally without merit. Defense counsel did not object before or after the instruction was given (Tr. 594), thereby waiving any attack on appeal. *United States* v. *Pinto*, 503 F.2d 718, 723 (2d Cir. 1974); *United States* v. *Valdes*, 417 F.2d 335, 338 (2d Cir. 1969), *cert. denied*, 399 U.S. 912 (1970); *United States* v. *Heliczer*, 373 F.2d 241, 245 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967). Moreover, there was no error in the charge, plain or otherwise. *Reagen* v. *United States*, 157 U.S. 301, 310 (1895);* *United States* v. *Tyers*, 487 F.2d 828, 831 (2d Cir. 1973); *United States* v. *Sclafani*, 487 F.2d 245, 257 (2d Cir.), *cert. denied*, 414 U.S. 1023 (1973);** *United States* v. *Mahler*, 363 F.2d 673, 678 (2d

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* In granting the Government's request for this charge Judge Owen deleted the "greater the interest the stronger the motive" language which was approved in *Reagan*.

** In *Sclafani* this Court approved a charge by Judge Palmieri which included the following language:

> "As the defendant he has a personal interest in the result of the case and such interest creates a motive for false testimony. The greater the interest, the stronger the motive and the defendant's interest in the result of this trial is of a character possessed by no other witness. . ." (Appellant's Appendix at A-253 in *United States* v. *Sclafani*).

Cir. 1966); *United States* v. *Sullivan*, 329 F.2d 755, 756 (2d Cir.), *cert. denied*, 377 U.S. 1005 (1964);* *United States* v. *Paccione*, 224 F.2d 801, 803 (2d Cir.), *cert. denied*, 350 U.S. 896 (1955). The instruction was not unfair or misleading in the context of the case.**

Martin's other claim is that the supplemental instructions of the Court in responding to a note that the jury sent in during its deliberations were erroneous. The contention is without merit.

The supplemental charge must be judged in the context of all of the instructions given the jury by the Court. See *Cupp* v. *Naughten*, 414 U.S. 141, 146-148 (1973); *United States* v. *Pinto*, *supra*, 503 F.2d at 724; *United States* v. *Tyers*, 487 F.2d 828, 832 (2d Cir. 1973); *United States* v. *Martin*, 475 F.2d 943, 947 (D.C. Cir. 1973). The case was essentially one which turned on credibility, the Government proving that Martin had embezzled large sums of money from St. Agatha's Home for Children and Martin claiming that, while he had indeed engaged in various irregularities in bookkeeping and check cashing, he had done so to conceal the desperate financial situation of the Home

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* In *Sullivan*, *supra*, 329 F.2d at 756-757, the trial judge had charged the jury as follows:

> "In this case, the defendant testified. There was no obligation or compulsion of the defendant to testify, but when he takes the stand and does testify, he is tested by all the same rules and guides that any other witnesses are tested by. You know that, of course, the defendant is interested—vitally interested—in the outcome of a case, his case. That is not to say anyone who is interested in the case necessarily lies, but it is a fact you must take into consideration. A man that is interested in the outcome of a case might see things differently. You and I do it sometimes consciously and sometimes subconsciously. We see things differently when we are interested in an event."

** Even defense counsel in his argument conceded that Martin had a motive to lie (Tr. 536).

and had not received a penny of the moneys which had been generated by his admittedly unorthodox activities.

When Judge Owen charged the jury, he read the two counts of the indictment and then said:

> "The charges center, as we are all aware, from the testimony about the Government's contention that the defendant wrongfully took *for his own personal use and benefit* moneys of his employer which moneys he failed to include in his returns, thereby understating income to that extent.
>
> In this connection, I charge you that the income derived from illegal gains, profits or by embezzlement, if you find there was such, is reportable and taxable just the same as lawfully received income." (Tr. 579; emphasis supplied).

These instructions were unexceptionable, *James* v. *United States*, 366 U.S. 213, 219 (1961), *United States* v. *Rosenthal*, 454 F.2d 1252, 1254 (2d Cir.), *cert. denied*, 406 U.S. 931 (1972), *United States* v. *Milder*, 459 F.2d 801 (8th Cir.), *cert. denied*, 409 U.S. 851 (1972), *Spies* v. *United States*, 317 U.S. 492 (1943), and unexcepted to. Judge Owen further charged the jury:

> "Now, the defendant contends that he succeeded to a cover-up of the shortages, that antedated his tenure, that they existed before he came on the job. And that while he continued this cover-up while he was the head of finance, and signed most of the unreported checks to that end, defendant contends that he did not personally receive one red cent from this and that his tax returns were a truthful statement of his income.
>
> Counsel for each side has argued his respective contentions to you with respect to this and other matters at length, and I am not going to review

the evidence on this aspect of the case because I think it would be needlessly repetitious.

Enough to say that if the Government has failed to satisfy you beyond a reasonable doubt that the defendant personally got substantial moneys from these unreported checks, then that would end the case.

It would be your duty to acquit at that point" (Tr. 582-583).

During deliberations, the jury sent in a note asking two questions (Tr. 601-602):

"(1) What is the definition of taxable income?

(2) As a matter of law, does the Government have to prove Mr. Martin made personal use of embezzlement proceeds to show unreported taxable income?"

After colloquy with counsel (Tr. 601-610), the Court responded to the note:

"Now, Mr. Foreman, I have received your note which has been marked Court Exhibit B and counsel and I have conferred about the appropriate response to be made.

Your first question is: "What is the definition of taxable income?"

The answer to that is, income after exemptions and deductions upon which the tax rate is applied. And as an illustration of that, I call your attention to line 11-D of Government's Exhibit 1 in evidence, which is the line setting forth taxable income in that particular return, and I will return that exhibit herewith to you which I borrowed from you (handing).

> Now Question 2 reads: "As a matter of law, does the Government have to prove Mr. Martin made personal use of embezzlement proceeds to show unreported taxable income?"

Now the answer to that question is as follows:

> The Government need only show unreported taxable income to Mr. Martin. The Government need not show how Mr. Martin spent it after it became his income, if you find that it did.
>
> Now, if there are further quesitons that are occasioned by this, I will await receipt of them in writing.
>
> This is the answer I believe should be submitted to you in answer to that question.
>
> So you may retire to the jury room and continue your deliberations" (Tr. 610-611).

Martin's complaint about the Court's response to the first question is unworthy of extended comment. The trial judge's instruction on the definition accurately followed the language of the statute, 26 U.S.C. §§ 61(a), 62(a), and was not excepted to by defense counsel. The trial judge had previously specifically defined taxable income insofar as it was relevant to the facts in the case.

Defense counsel did except to the Court's response to the second question on the ground repeated here by Martin —that it was "destructive of the defense presented." (App. Br. 28). The contention is without merit. Martin claims that "[w]hat the jurors wanted to know was not how appellant spent the money after it became his income, but whether it became his income at all. Thus, in forming his answer, the Judge skipped a step in the necessary chain of proof." (App. Br. 31).

The inaccuracy of this claim is established by the record. The trial judge had properly instructed the jury that the money generated by Martin's check cashing activities was income to him only if he had embezzled it, that is, if Martin "wrongfully took [it] for his own personal use and benefit . . ." (Tr. 579, 582-582). The "step" which Judge Owen is said to have "skipped . . . in the necessary chain of proof" is one which was unnecessary to deal with, since the jury's note indicated that it had already found the moneys concededly obtained by Martin from the funds of the Home to be "embezzlement proceeds" (Tr. 602). The Court's interpretation of the note was clearly the proper one, given the previous accurate statement of what the Government had to prove in the main instructions, the language of the note, the failure of the Government to offer direct proof of how Martin had spent the "embezzlement proceeds", and the absence in the main charge of any instruction on the significance or lack of significance of the absence of such proof. The Court thus responded to the jury's question exactly as it had been framed. The note did not request a repetition of the earlier instructions concerning embezzlement, and nothing in the note suggested that such repetition was necessary. The jury asked for no further amplifications thereafter.

Whether and to what extent supplemental instructions to a jury are warranted is within the trial court's discretion. *United States* v. *Bayer*, 331 U.S. 532, 536-537 (1947); *United States* v. *Tyers, supra*, 487 F.2d at 832; *United States* v. *Center Veal & Beef Co.*, 162 F.2d 766, 771-772 (2d Cir. 1947) (L. Hand, *C.J.*); *Howard* v. *United States*, 389 F.2d 287, 290 (D.C. Cir. 1967) (Davis, *J.*). No abuse of that discretion has been shown.

CONCLUSION *

The Order adjudging Martin in Contempt of Court and the Judgment of Conviction Should Be Affirmed.

Respectfully submitted,

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* The remaining contention based on the prosecutor's remarks, taken out of context, is frivolous. Such non-prejudicial flourishes of rhetoric, *United States* v. *White*, 486 F.2d 204, 207 (2d Cir. 1973), when considered in the context of all that occurred at trial, cannot seriously be claimed to have prejudiced Martin. *United States* v. *Bivona*, 487 F.2d 443, 447 (2d Cir. 1973).

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